Supreme Court, U.S.
FILED
MAY 3 2002

No. 01-1283

In the Supreme Court of the United States

DEBRA MCMASTERS, PETITIONER

v.

UNITED STATES OF AMERICA AND THE DEPARTMENT OF THE NAVY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, after a federal case has been transferred to a more convenient forum pursuant to 28 U.S.C. 1404(a), the transferee district court should follow the law of its own circuit as to issues of uniform federal law, rather than applying the law of the transferor court.

2. Whether, following such a transfer, the doctrine of law of the case binds the court of appeals reviewing the transferee district court's judgment to a ruling of the transferor district court, even if that ruling is clearly erroneous and would work a manifest injustice.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Rule involved	2
Statement	4
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Agostini v. *Felton*, 521 U.S. 203 (1997)	10
Arizona v. *California*, 460 U.S. 605 (1983)	6, 10
Borzeka v. *Heckler*, 739 F.2d 444 (9th Cir. 1984)	8, 9
Bradley v. *United States*, 161 F.3d 777 (4th Cir. 1998)	8
Campos v. *Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), cert. denied, 525 U.S. 1102 (1999)	8
Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988)	6, 10
Eckstein v. *Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), cert. denied, 510 U.S. 1073 (1994)	8-9
Ferens v. *John Deere Co.*, 494 U.S. 516 (1990)	7
Korean Air Lines Disaster, In re, 829 F.2d 1171 (D.C. Cir. 1987), aff'd on other grounds *sub nom.* *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989)	8
Menowitz v. *Brown*, 991 F.2d 36 (2d Cir. 1993)	9
Messenger v. *Anderson*, 225 U.S. 436 (1912)	10
Mohasco Corp. v. *Silver*, 447 U.S. 807 (1980)	6
Murphy v. *FDIC*, 208 F.3d 959 (11th Cir. 2000), cert. dismissed, 531 U.S. 1107 (2001)	8
Murphy Bros. v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999)	10
Newton v. *Thomason*, 22 F.3d 1455 (9th Cir. 1994)	8

Cases—Continued: Page

Olcott v. *Delaware Flood Co.*, 76 F.3d 1538 (10th Cir. 1996) 9
Pan Am. Corp., In re, 950 F.2d 839 (2d Cir. 1991) 8
Van Dusen v. *Barrack*, 376 U.S. 612 (1964) 7
Whale v. *United States*, 792 F.2d 951 (9th Cir. 1986) 9

Statutes and rules:

Federal Tort Claims Act:
28 U.S.C. 1346(b) (1994 & Supp. V 1999) 4
28 U.S.C. 2680(a) 5
28 U.S.C. 2680(h) 5
15 U.S.C. 78aa-1(a) 8
28 U.S.C. 1404(a) 5, 7
Sup. Ct. R. 10 11
Fed. R. Civ. P.:
Rule 4 ..... 2, 4, 5, 6, 7, 8, 9
Rule 4(i) 4, 7, 8
Rule 4(i)(1) 4
Rule 4(m) 4

In the Supreme Court of the United States

No. 01-1283

DEBRA MCMASTERS, PETITIONER

v.

UNITED STATES OF AMERICA AND THE DEPARTMENT OF THE NAVY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 260 F.3d 814. The opinions of the district court (Pet. App. 11a-14a, 15a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2001. A petition for rehearing was denied by order entered on November 1, 2001, and amended on November 2, 2001. Pet. App. 28a-29a. On February 12, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including March 1, 2002, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

At the time relevant to this action, Rule 4 of the Federal Rules of Civil Procedure provided in relevant part:

> **(c) Service with Complaint; by Whom Made.**
>
> (1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.
>
> * * * * *
>
> **(i) Service Upon the United States, and Its Agencies, Corporations, or Officers.**
>
> (1) Service upon the United States shall be effected
>
> (A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) Service upon an officer, agency, or corporation of the United States, shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

* * * * *

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified

> time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

Fed. R. Civ. P. 4(c), (i) and (m).

Rule 4(i) was amended in 2000, but that amendment did not materially change the language relevant to the issues in this case.

STATEMENT

1. Petitioner's fifteen-year old daughter was raped and murdered by Valentine Underwood, a Marine. Pet. App. 2a. He was convicted by a California court of that murder and the murder of another woman and is currently serving two consecutive life sentences. *Id.* at 2a n.1. Petitioner brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) (1994 & Supp. V 1999), alleging that the Marine Corps negligently recruited, enlisted, supervised, and retained Underwood. Pet. App. 4a.

Initially proceeding pro se, petitioner filed her complaint in the Central District of California on February 28, 1995. Pet. App. 2a. She served the summons and complaint upon the Marine Corps base in California five months later on July 30, 1995. *Ibid.* Eleven months after that, in June 1996, she sent copies of the summons and complaint by certified mail to the Commandant of the Marine Corps, the Department of the Navy, and the Attorney General. *Id.* at 20a. She did not, however, serve the United States Attorney for the Central District of California as required by Federal Rule of Civil Procedure 4(i)(1). Pet. App. 20a.

During this period the district court issued repeated orders to petitioner to show cause why her action should not be dismissed for lack of proper service. Pet. App. 20a-21a. Petitioner then moved for default judgment on March 25, 1998. *Id.* at 21a. The government opposed this motion and stated that the United States Attorney's Office had become aware of the suit only upon the filing of petitioner's motion for default judgment. *Ibid.*

The district court denied the motion for default judgment. Pet. App. 3a. The court, however, "deem[ed] the U.S. Attorney's Office as served" and held that petitioner had "substantially complied" with Federal Rule of Civil Procedure 4. Pet. App. 3a.

2. Petitioner then moved pursuant to 28 U.S.C. 1404(a) to transfer her case from the Central District of California to the Northern District of Illinois, where she resided. Pet. App. 3a; Pet. 12.[1] The district court granted her unopposed motion. Pet. App. 3a. Then represented by counsel, petitioner filed an amended complaint. The government answered and moved for judgment on the pleadings, or alternatively for summary judgment. *Id.* at 4a. The government argued that the case should be dismissed for insufficient service of process and because petitioner's claims were barred by the assault and battery and discretionary function exceptions to the FTCA, 28 U.S.C. 2680(a) and (h). Pet. App. 4a. Petitioner also moved for summary judgment. *Ibid.*

---

[1] 28 U.S.C. 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The district court dismissed the suit on the ground that service of process was insufficient because the United States Attorney had not been served. Pet. App. 15a-26a. Noting that it was "generally bound by the law of the case doctrine to not upset prior rulings in a case," the district court held that it could depart from such rulings if "the initial decision was clearly erroneous and would work a manifest injustice." *Id.* at 21a-22a (quoting *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988), and *Arizona* v. *California*, 460 U.S. 605, 618 n.8 (1983)). The court held that this test was met given petitioner's "complete failure to serve" the United States Attorney. *Id.* at 23a. While acknowledging that dismissal "seems like a harsh result" because the statute of limitations bars petitioner from refiling her claim, the district court explained that this Court has emphasized that "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 24a (quoting *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980)). The district court denied petitioner's motion for reconsideration, holding that it had properly relied upon precedents of the Seventh Circuit, not the Ninth Circuit, when construing Federal Rule of Civil Procedure 4 after the case had been transferred. Pet. App. 13a-14a.

3. The Seventh Circuit affirmed. Pet. App. 1a-10a. It held that the "plain language of Rule 4(i)" requires service upon the United States Attorney for the district in which the suit is brought. *Id.* at 5a. Accordingly, the court of appeals agreed with the district court that the District Court for the Central District of California "clearly erred in excusing [petitioner] from ever having served or having to serve the U.S. Attorney." *Id.* at 7a

(quoting *id.* at 23a). The court of appeals also held that the district court applied the correct standard of the law-of-the-case doctrine and that, in any event, that doctrine did not restrict it as an appellate court from determining the correct interpretation of Rule 4(i). *Id.* at 7a-8a. Finally, the court of appeals affirmed the district court's holding that the law of the transferee circuit, the Seventh Circuit, rather than that of the transferor circuit, the Ninth Circuit, governed the construction of Rule 4(i). *Id.* at 9a-10a.

ARGUMENT

The decisions of the court of appeals and district court are correct and do not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. The petition (Pet. 10-11) first argues that this Court should determine whether *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), should be extended to require the transferee court (here the Northern District of Illinois) to apply the law of the transferor court (here the Central District of California) regarding a federal-law claim after a transfer under 28 U.S.C. 1404(a). This Court has held that, when a *diversity* suit is transferred, the transferee court should apply the *state law* of the transferor court whether the transfer is sought by the defendant (*Van Dusen*) or the plaintiff (*Ferens* v. *John Deere Co.*, 494 U.S. 516 (1990)).

The Seventh Circuit correctly rejected the argument that *Van Dusen* should be extended to questions of uniform federal law. Pet. App. 9a-10a. As it explained, there is only one proper interpretation of Rule 4, and each federal court should seek that interpretation independently. It would make no sense to force the Seventh Circuit to apply the Ninth Circuit's inter-

pretation of a uniform federal law that both courts are charged with interpreting. The situation in *Van Dusen* is quite different because the federal court will necessarily have to apply the law of a different jurisdiction, and the only question is which state law to apply. Here, by contrast, petitioner would force the Seventh Circuit to apply the law of the Ninth even if the Seventh Circuit previously answered the same question of federal law differently. There is no principle of law or logic that would require such an anomolous result.

Contrary to petitioner's contention (Pet. 18-23), the holding below does not conflict with the decision of any other court of appeals. The courts of appeals have uniformly held that the transferee court is not bound by the law of the transferor court on a federal-law issue where federal law is intended to be uniform—as it is here with respect to the interpretation of Rule 4. See *Murphy* v. *FDIC*, 208 F.3d 959, 964-966 (11th Cir. 2000), cert. dismissed, 531 U.S. 1107 (2001); *Bradley* v. *United States*, 161 F.3d 777, 782 n.4 (4th Cir. 1998); *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1171 n.4 (8th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); *Newton* v. *Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994); *In re Pan Am. Corp.*, 950 F.2d 839, 847 (2d Cir. 1991); *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1174-1176 (D.C. Cir. 1987) (R. Ginsburg, J.), aff'd on other grounds *sub nom. Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).[2] Thus, no further review of that issue is warranted.

---

[2] Sometimes, however, federal law is not uniform, as illustrated by 15 U.S.C. 78aa-1(a), which adopts varying statutes of limitations. In this circumstance, the Seventh and Tenth Circuits have held that the transferee court should apply the statute of limitations of the transferor court. *Eckstein* v. *Balcor Film Investors*, 8 F.3d 1121, 1126-1127 (7th Cir. 1993), cert. denied, 510 U.S. 1073

In any event, petitioner has not established that the Ninth Circuit would decide the underlying service-of-process issue differently than the Seventh Circuit. Petitioner's conflict argument (Pet. 16-17) relies solely on *Borzeka* v. *Heckler*, 739 F.2d 444 (9th Cir. 1984), but that case was decided before the substantial revision in 1993 of Rule 4(i)'s provisions regarding service upon the government. The plaintiff in *Borzeka* had attempted to serve the appropriate United States Attorney by sending the summons and complaint by certified mail, rather than by personally serving him as Rule 4 at that time required. *Id.* at 445-447. The *Borzeka* plaintiff alleged that his failure to personally serve the United States Attorney had been caused by the fact that he "received erroneous information from the 'lower court' regarding service of process." *Id.* at 447. The *Borzeka* court merely held that failure to comply with the then-existing requirement of personal service could be excused where the plaintiff could show "good cause" or "justifiable excuse" for his failure to personally serve and timely service to the United States Attorney was effected by other means. The Ninth Circuit, in *Whale* v. *United States*, 792 F.2d 951, 953-954 (1986), limited *Borzeka* by holding that there is no "good cause" or "justifiable excuse" where "[t]he defect in service * * * was due solely to the failure of

---

(1994); *Olcott* v. *Delaware Flood Co.*, 76 F.3d 1538, 1545-1547 (10th Cir. 1996). The Second Circuit adopted the contrary position. *Menowitz* v. *Brown*, 991 F.2d 36, 40-41 (1993) (per curiam). Because Federal Rule of Civil Procedure 4 is intended to apply uniformly, that narrow conflict is not presented in this case. That point is underscored by the fact the Seventh Circuit, which applies the rule that gives greater application to the law of the transferor court when federal law is not uniform, did not apply the law of the transferor court here.

[plaintiff's] counsel to pay attention to the requirements of [Rule 4]." Accordingly, the Seventh Circuit properly expressed doubts that it would reach a different result in this case even if it had applied Ninth Circuit law. See Pet. App. 9a ("We are not convinced that McMasters' service of the United States was proper even under the test articulated in *Borzeka*.").

2. The petition (Pet. 15-18) also argues that the doctrine of law of the case prevented the District Court for the Northern District of Illinois from overturning the holding of the District Court for the Central District of California on the service-of-process issue. The Seventh Circuit persuasively rejected that argument on two independent grounds. Pet. App. 7a-8a. First, the law of the case doctrine applies only to decisions of the same or coordinate courts; it does not bind the court of appeals to a determination of a question of law by either of the district courts below. See *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). Second, law of the case does not require adherence to a prior decision of a coordinate court that is "clearly erroneous and would work a manifest injustice." *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997); *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. at 817; *Arizona* v. *California*, 460 U.S. 605, 618 n.8 (1983). Petitioner does not challenge this second principle, but only contests its application to the facts of this case. See Pet. 15-18. The decisions below, however, are amply supported by the plainly stated requirements for service of process set forth in Rule 4. Service of process is a prerequisite to the district court's exercise of personal jurisdiction. *Murphy Bros.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350-351 (1999). In any event, this Court's review of a fact-specific application

of a properly stated and unchallenged legal principle is not warranted. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

MAY 2002